SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 712.

THE INTERNATIONAL ASSOCIATION OF MACHINISTS,

Petitioner,

v.

VINCENT P. BRADY,

Respondent.

No. 713.

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

VINCENT P. BRADY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The reported opinions of the District Court (Appendix D of Petition) may be found at 156 F. Supp. 82 (1957); 167 F. Supp. 469 (1958); 174 F. Supp. 360 (1959); 196 F. Supp. 504 (1961); 223 F. Supp. 361 (1963); and, 224 F. Supp. 820 (1965). The unreported memorandum opinion and order may be found in Appendix D of Petition, p. 111a and 114a.

The opinion of the Court of Appeals, yet unreported, may be found in Appendix B of the Petition, p. 6a.

JURISDICTION.

Federal Question Jurisdiction exists by virtue of the alleged and proven violation of the Railway Labor Act, 45 USCA § 152 (Fourth) and (Eleventh) and the alleged and proven hostile discrimination practiced by a union upon a union member to secure his discharge from his employment in violation of the said act.

QUESTIONS PRESENTED.

1. Was not the Court of Appeals correct in ruling that a Systems Board of Adjustment established pursuant to the requirements of Section 204 of the Railway Labor Act (45 USCA Sec. 184) did not have jurisdiction over a dispute primarily between an air line employee and his bargaining representative where only incidental interpretation of the Bargaining Agreement was involved?

2. Was not the Court of Appeals correct in ruling that the decision of a Systems Board of Adjustment was not final and binding upon an airline employee where the Systems Board did not have jurisdiction over the subject matter of the dispute between the employee and his bargaining representative in the first instance?

3. Was not the Court of Appeals correct in ruling that Federal Question Jurisdiction existed over an action by a discharged air line employee against his union and his employer seeking reinstatement to membership in his union and to his employment where willful and deliberate discrimination by his bargaining representative to effect his discharge is alleged and proven?

4. Assuming *arguendo* that the answer to 3 is "No", was not the Court of Appeals correct in ruling that Federal Question Jurisdiction existed over an action by a discharged air line employee against his union and his employer seeking reinstatement to membership in his union and to his employment where it is alleged and proven that his discharge violated the Railway Labor Act, 45 USCA § 152 (Fourth) and (Eleventh).

5. Assuming *arguendo* that the answers to Questions 3 and 4 are "No", does not Federal Question Jurisdiction

exist over an action by a discharged air line employee against his union and his employer seeking reinstatement to membership in his union and to his employment where it is alleged and proven that the provision of the union constitution, as interpreted by the union and upon which the union justified its action in canceling the employee's union membership and causing his discharge, conflicted with the clear union security provision of the Bargaining Agreement and thus violated the Railway Labor Act, 45 USCA § 152 (Eleventh).

6. Was not the Court of Appeals correct in holding that the doctrine of exhaustion of internal union remedies did not apply to a union employee who was caused to be discharged from his employment by his bargaining representative in violation of the Railway Labor Act?

7. Was not the Court of Appeals correct in holding that a union member had maintained good standing membership in the union by payment of dues and was not subject to cancellation of union membership nor to discharge from his employment?

8. Was not the Court of Appeals correct in holding that the employer was jointly liable with the bargaining representative for causing the discharge of an employee in violation of the Railway Labor Act, 45 USCA § 152 (Fourth) and (Eleventh)?

STATUTES.

The pertinent provisions of the Railway Labor Act, 45 USCA § 152 (Fourth), (Fifth), (Seventh) and (Eleventh); and Section 184, are set forth in Appendix A of the Petitions filed by the I. A. M. and T. W. A.

COUNTER-STATEMENT.

Vincent P. Brady's (Brady) action against Trans World Airlines (T. W. A.) and the International Association of Machinists (I. A. M.) seeks reinstatement to his employment and membership in the I. A. M. as well as legal damages, including punitive damages, caused by his unlawful discharge in violation of the Railway Labor Act, 45 U. S. C. A. Sec. 152 (Eleventh) and (Fourth).

The District Court found the I. A. M. and T. W. A. jointly liable to Brady and ordered that he be reinstated to his employment with T. W. A. (with all benefits) and to membership in the I. A. M., and be paid $10,617.80 in back wages; but the District Court denied Brady's claim to common law damages.[1] The District Court's decision was affirmed by the United States Court of Appeals for the Third Circuit.[2] This Brief is filed by Brady as Respondent to the Petitions for Writ of Certiorari filed by the I. A. M. (No. 712) and T. W. A. (No. 713).

Brady has also filed a Cross-Petition for Writ of Certiorari, No. 735, October Term, 1968, requesting review of that portion of the decision of the Court of Appeals which denied Brady a jury trial to prove common law damages, *i.e.*, compensatory damages for the pain and suffering incurred by him and his wife by reason of the unlawful discharge, legal expenses and punitive damages.

On May 8, 1956, Brady was discharged from his employment with T. W. A. in violation of the Railway Labor Act, 45 U. S. C. A. Sec. 152 (Eleventh) and (Fourth). Brady's discharge, although unlawful, was upheld by an Airline Systems Board of Adjustment, on May 14, 1956.

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1. *Brady v. T. W. A., et al.*, (Petitioners' Appendix D, pp. 111a-113a).

2. *Brady v. T. W. A., et al.*, (Petitioners' Appendix B, pp. 6a-39a).

Brady was employed by T. W. A. from 1951 through his discharge in May, 1956 (N. T. 14).[3] He was a line mechanic and a member of local 1776 of the I. A. M. (N. T. 17). He was elected to the position of shop steward in local lodge 1776 in the early part of 1956 (N. T. 20).

Brady submits that the I. A. M. through hostile and bad faith discriminatory practices secured his discharge from his employment with T. W. A. in violation of the Railway Labor Act, because he outwardly opposed union procedures used to raise the dues of the membership.

While serving as a shop steward, Brady was approached by a number of employees who were disgruntled over the procedures used by the I. A. M. in raising the dues of membership for the local from $3.00 per month to $3.25 per month. These employees asked Brady to help them protest against the union procedures (N. T. 24-25).

Brady attended the next meeting of the membership, held in December of 1955, and opposed the dues increase. A motion made by Brady to rescind the dues increase and reconsider the entire dues question at the next general meeting to be held in January, 1956, passed by a vote of 14 to 3. The vote also directed the posting of notices to explain the details of the dues question prior to the January, 1956, meeting (N. T. 22-26) (Exhibit P-26).

The I. A. M. never posted notices of the meeting, and, in fact, never held a general meeting in January, 1956 (N. T. 26). Brady complained bitterly to local and international officials about the treatment of the membership. He wrote a letter on February 9, 1956 to the International President, A. J. Hayes (Exhibit P-63) to formalize his complaint, and he refused to tender dues except at the old rate

3. References are to the Notes of Testimony of the hearing held August 27, 1962.

until March 27, 1956, when he paid dues in full at the new rate.

The bizarre set of events that followed which ended in Brady's discharge clearly establish that he was subjected to hostile and bad faith discrimination. The I. A. M. made three different demands upon Brady in March and April, 1956, within a period of thirty days (Exhibits P-3, P-4, P-14). The first demand was made March 13, 1956, when Miller demanded dues be paid by March 28, 1956 (Exhibit P-3). The second demand occurred on March 28, 1956, when Coleman, after receiving Brady's tender of dues, and after consulting with Miller, notified Brady by duplicate letters that he was rejecting his tender, and demanding three months dues (which Brady had already paid) and a $25.00 reinstatement fee (Exhibit P-4) (N. T. 259, 273). The third demand was made on April 11, 1956, when Miller demanded only a reinstatement fee (Exhibit P-14).

Brady, in response to the first demand, tendered dues on March 27, 1956, just within the time limitation set in Miller's letter of March 13, 1956 (N. T. 242). Brady's tender was for $10.50 and was intended to cover three months dues—December, 1955 (due January 31, 1956), January, 1956 (due February 28) and February, 1956 (due March 31).[4] Brady even submitted his dues book with his March 27, 1956 tender so that there would be no doubt as to the intended purpose of the payment (N. T. 242, 254).

When the second demand was made by Coleman on March 28, 1956, requesting payment of three months dues

4. Article XXVI(a) (Exhibit P-6) entitled "Union Security" provides: ". . . for the purpose of this Article, 'membership in good standing in the union' shall consist of the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month, which are uniformly required of members of his classification (and at his point on the company's system) as a condition of acquiring or retaining membership."

Brady had paid dues through November, 1955.

($9.75),[5] which Brady had already paid, and a $25.00 reinstatement fee, Brady complained to union and company personnel about the switch in the union demands (N. T. 44-47).[6] He was informed that the matter was out of control and that "it is between you and the union. It is a union matter." (N. T. 47).

Brady also sent telegrams to Miller and to the Industrial Relations Section of T. W. A. requesting assistance on the application of the union security provisions of the bargaining agreement (N. T. 47-54). Concerned that payment of a reinstatement fee would result in loss of seniority, Brady filed his first appeal to the Systems Board of Adjustment on April 3, 1956, requesting that they review his circumstances and the demand made by the I. A. M. for a reinstatement fee (N. T. 55).

Upon learning from Coleman that Brady had not met the demands of Coleman's March 28, 1956 letter (Exhibit P-4), Miller certified Brady for discharge (Exhibit P-15) and asked Coleman to give him in writing a summary of Coleman's correspondence with Brady which evidenced Brady's attempts to pay dues (Exhibit P-11) (N. T. 309, 397). After reviewing the material sent by Coleman, Miller realized that the union had made an erroneous demand upon Brady in requesting both dues and a reinstatement fee (N. T. 281, 297) and thereupon proceeded to cancel the initial discharge action (Exhibit P-15).

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5. The actual dues increase that was placed into effect by the I. A. M. for Local 1776 was $.25 per man (J. A. 348a). Brady believed the dues were raised $.50, which was the reason he tendered $10.50 (J. A. 352a).

6. The I. A. M. by demanding a reinstatement fee was invoking the cancellation of membership provision of the I. A. M. Constitution. See Article E, Sec. 14 (Exhibit P-7) which provides: "Membership Cancelled, Sec. 14. Delinquency for 3 months in the payment of dues or assessment shall automatically cancel membership and all rights, privileges and benefits incident thereto . . ."

After Miller had cancelled Brady's initial discharge, he wrote on April 11, 1956, to Brady demanding that a reinstatement fee be paid by April 28, or a second discharge action would be initiated (Exhibit P-14). Brady, on April 18, 1956, wrote Miller that he be given the opportunity to pay his dues rather than a reinstatement fee, as he did not wish to lose his seniority with T. W. A. (Exhibit P-19). Miller rejected Brady's offer to pay dues (Exhibit D-2). Brady then filed his second appeal to the Systems Board of Adjustment requesting that they review Miller's demand for a reinstatement fee (N. T. 58-59).

After the I. A. M. had rejected Brady's March 27, 1956, tender of dues and his other appeals, he felt that the union was out to get him (N. T. 44), and that his job was in jeopardy (N. T. 53). Brady appealed to the Systems Board of Adjustment because he felt that unless he did, he would forfeit his job without any further action being taken (N. T. 53).[7]

Aside from the fact that Brady thought he was required to appeal to the Systems Board, he also felt that he would receive an objective hearing since the Board did consist of members of the employer as well as the I. A. M. (N. T. 53-54). However, because Miller in his presentation to the Board advocating Brady's discharge, misrepresented certain essential facts, there existed no possibility that Brady would receive a fair hearing (Exhibits P-1, P-2).

Miller represented to the Systems Board that Brady, on March 27, 1956, tendered dues at the rate of $3.00 per month rather than the required $3.25 per month (Exhibits P-1, P-2), whereas, Coleman had previously informed Miller that Brady had tendered his dues (N. T. 256-259), and also

7. T. W. A.-I. A. M. agreement, Article XXVI, "(f) . . . In the event no protest is so filed within the above time limits, the action will be considered as proper and will be final and binding upon all parties concerned."

informed Miller of the exact amount of the check (N. T. 258). Miller also had available a letter from Coleman dated April 7, 1956 (Exhibit P-11), stating specifically that Brady had paid dues on March 27, 1956.[8]

Miller represented to the Systems Board that Brady had been informed prior to March 27, 1956, that he was also subject to automatic cancellation of his union membership and was required to pay a reinstatement fee (Exhibits P-1, P-2) whereas Miller's March 13, 1956, demand letter did not request a reinstatement fee (Exhibit P-3), and Brady, prior to March 27, 1956, had never been asked to pay one (N. T. 49-50, 375). In addition, Miller admitted that if Brady had tendered four months dues on March 27, 1956 (which would have involved an additional $2.50), rather than three, it would have been accepted (N. T. 396). Yet, Miller never explained to Brady why four months dues instead of two were demanded under the Bargaining Agreement, and, after March 27, 1956, Miller never again gave Brady the opportunity to retender dues.

Miller also told the Board that he instructed Coleman to give Brady until April 4, 1956, to pay dues, since Brady had indicated a desire to pay previously (Exhibits P-1, P-2); whereas Coleman, after talking to Miller by telephone on March 28, 1956 (N. T. 254-259), immediately wrote Brady duplicate letters demanding three months dues plus a reinstatement fee (N. T. 259, 274), and even Miller, in his April 11, 1956, letter to Brady, stated that Coleman erroneously demanded both dues and a reinstatement fee, and that he only should have demanded a reinstatement fee (Exhibit P-14).

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8. Coleman's April 7, 1956, letter to Miller pointed out three times when Brady had tendered dues at the rate of $3.00, then, in the last paragraph stated (Exhibit P-11):

> "The fourth and final time was on March 27, when he sent the dues and no reinstatement fee. Acting on your advice I returned it with a letter stating the reason."

Lastly, the copy of Coleman's March 28, 1956, letter that Miller read to the Systems Board, omitted the reference in that letter to the amount of Brady's previous tender on March 27. Compare the letter read to the Systems Board of Adjustment by Miller at the May 4th and 14th, 1956 hearings (Exhibits P-1 and P-2)—(see Exhibit P-13) with the copy of the original sent to Brady (Exhibit P-4).

It was in reliance upon testimony presented by Miller, that the Systems Board, consisting of two representatives of T. W. A. and two representatives of the I. A. M., affirmed Brady's discharge (Exhibit P-73). The Systems Board believed that Brady had not tendered sufficient dues to maintain his membership in good standing under Article XXVI(a), and upheld his discharge.

At trial, Miller and Coleman both testified that they understood dues were payable on the first day of the month (N. T. 247, 389), even though Article XXVI(a) provided otherwise. In practice, however, during the month and a half preceding the discharge these individuals, particularly Coleman, treated other employees quite differently than they treated Brady in enforcing the dues collection procedures of Local 1776. For instance, Coleman would permit other employees to pay less than he believed to be due (N. T. 222);[9] would be lenient if the employee expressed an interest and intent to pay (N. T. 232); would make change if an odd amount was paid (N. T. 235); would permit other employees to become five and, in one case, seven months behind (N. T. 223); and had never cited any

9. Using Coleman's standard for dues payment the following employees were permitted to pay less than the amount that was due: McClosky—paid three months on February 20, 1956, when four months were due (N. T. 211); Connelly—paid two months on April 7, 1956 when four months were due (N. T. 210-211); Fimple—paid two months on August 31, 1956, when seven months were due (N. T. 211); DiBacco—paid one month on April 7, 1956 when four months were due (N. T. 213).

other employee, except Brady, for discharge, or even taken action against any other employee to enforce dues payment (N. T. 227, 228).

On the other hand, Coleman cited Brady for discharge on March 3, 1956, eight days after the final day set for payment in the bulletin board notice—February 25, 1966 (Exhibit P-66), a notice which listed Brady as two months delinquent, whereas he was only one. He rejected at least five tenders from Brady of dues at the $3.00 rate (N. T. 234). He refused to accept Brady's dues unless they were the exact amount due (N. T. 245-230). He rejected Brady's tender of $10.50 on March 27, 1956, although he knew it was intended as payment of dues (N. T. 244). Instead of accepting the $10.50 and applying it to Brady's dues delinquency, Coleman called Miller in Kansas City, Missouri, to find out what to do (N. T. 249). As a result of that conversation, Brady's tender was refused and his membership in the union cancelled. His discharge followed.

After Brady's discharge, he pleaded with the I. A. M. and T. W. A. to reconsider, but they both refused, even though the facts of the discrimination and the illegality of the discharge were related to them by Brady.

For instance, Brady after the discharge, on May 17, 1956, sent a telegram to Miller to ask if Brady had any recourse under the I. A. M. Constitution. Miller replied only that the decision of the Systems Board was final and binding.

On June 7, 1956, Brady had his attorney at that time write the I. A. M. and T. W. A. to request reinstatement, pointing out the illegality of the discharge, but both the I. A. M. and T. W. A. refused to act (Exhibit P-76).

On October 18, 1956, Brady wrote to D. W. Harris, Vice President, Industrial Relations, T. W. A., to point out the wrongful acts of the I. A. M. in securing his dis-

charge, but to no avail (Exhibit P-68, which is set forth at footnote 13 of Brady's Petition for Writ of Certiorari because it is missing from the record).

On February 4, 1957 Brady wrote to each member of the Systems Board and the International President of the I. A. M. to point out the wrongful acts committed by the I. A. M. and to request reconsideration, but to no avail (Exhibit P-75).

It was only after these exhaustive attempts to secure reconsideration of his discharge failed, that Brady started suit in the Federal Court.

Federal question jurisdiction exists. Brady has alleged in his Complaint, as amended, and has proven that the I. A. M. hostilely and in bad faith discriminated against him causing his discharge in violation of the Railway Labor Act, 45 U. S. C. A. Sec. 152 (Eleventh). Further, because Brady was discharged in violation of Sec. 2 (Eleventh) of the Railway Labor Act, the discharge was also a violation of Sec. 2 (Fourth) of that Act. Lastly, Brady's action attacks the validity of the union security provisions of the T. W. A.-I. A. M. Bargaining Agreement and the I. A. M. Constitution under the Railway Labor Act, 45 U. S. C. A., Sec. 152 (Eleventh) and (Fourth).

The Court of Appeals held that the I. A. M. and T. W. A. had violated the Railway Labor Act by discharging Brady for reasons other than non-payment of dues, and ordered that Brady be reinstated with full benefits to his employment with T. W. A. and to membership in the I. A. M., and that both defendants pay Brady a total of $10,617.80 in back wages. (*Brady v. T. W. A., et al.*, Appendix B of the Petitions of the I. A. M. and T. W. A. p. 6a).

We submit that the decision of the Court of Appeals was correct in finding Federal jurisdiction existed over the subject matter of Brady's claim and awarding the relief that it did.

However, Brady submits that the Court of Appeals should have gone further and granted Brady a new trial to prove before a jury punitive and compensatory damages suffered by reason of the mental anguish he and his wife have endured to secure reinstatement to his rightful job.

For instance, Brady was out of work for 495 days after his discharge. He has paid approximately $4,600 in court costs alone over these twelve years of litigation. He has had to pay the cost of substantial medical expenses for his wife who developed cancer, expenses which would have been covered by T. W. A.'s employee medical policy. Clearly $10,617.80 in damages does not make Brady whole.

This issue is covered in Brady's Petition for Writ of Certiorari, No. 735.

ARGUMENT.

I. Reasons for Denying the Petition Filed by the I. A. M.

A. The Decision of the Court of Appeals That the Airlines Systems Board of Adjustment Did Not Have Jurisdiction to Consider a Controversy Between an Employee and His Bargaining Agent, Where Only Incidental Interpretation of the Bargaining Agreement Is Involved, Does Not Conflict With the Decisions of This Court or the Decisions of Other Courts of Appeals.

Section 204 of the Railway Labor Act [10] sets forth the jurisdiction of the Airlines Systems Board of Adjustment, as follows:

> ". . . disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . may be referred by petition of the parties or by either party to an appropriate adjustment board . . ."

Brady alleged in his complaint and has proven at trial facts establishing that representatives of the I. A. M., his bargaining agent, hostilely and in bad faith discriminated against him to have him discharged from his employment with T. W. A. Specifically, representatives of the I. A. M. arbitrarily refused a valid tender of dues (which tender was requested by representatives of the I. A. M.); they terminated without cause his membership in the union; they cited him for discharge after they knew he had made a valid tender of dues; and, then, they inten-

10. 45 USCA § 184.

tionally misrepresented essential facts at two systems board of adjustment hearings to secure affirmance of their unlawful discharge action in an attempt to make it final and binding on Brady. But for the discriminatory acts of the I. A. M., Brady would still be employed with T. W. A.

T. W. A. was not a party to the I. A. M.'s discriminatory acts which took place prior to and during the Systems Board hearing, and which resulted in Brady's discharge. However, T. W. A. by law is liable to Brady for the unlawful discharge action and is an essential party to these proceedings to enable Brady to obtain complete relief, i.e., reinstatement to his employment, which the I. A. M. cannot grant.[11]

Since Brady's controversy is primarily with the I. A. M., his bargaining agent, not T. W. A., his employer, the systems Board of Adjustment did not have jurisdiction in the first instance over the subject matter of Brady's claim. See *Conley v. Gibson,* 355 U. S. 41 (1957), where this Court stated:

> "But ¶ 3 First (i) by its own terms applies only to disputes between an employee or group of employees and a carrier or carriers. This case involves no dispute between employee and employer but to the contrary, is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment Board has no power under paragraph 3 First (i) or any

11. *Cunningham v. Erie RR,* 358 F. 2d 640, 645 (2 Cir. 1966). See also the Note at 76 Yale L. J. 210 (1966).

Brady claims in his Cross-Petition for Certiorari that TWA after learning of the IAM's discriminatory acts, in October of 1956, six months after the discharge, had an obligation to cancel the discharge, and because they failed to do so, should be held accountable to Brady (with the IAM) for the suffering and legal expenses he has incurred over these twelve years to secure reinstatement (see Exhibit P-68 set forth in footnote 13 of Brady's Petition No. 735 October Term 1968).

other provision of the Act to protect them against such discrimination."

The I. A. M. has not questioned Brady's claim that his controversy is primarily with the I. A. M., his bargaining representative. Instead, the I. A. M. argues that because resolution of Brady's controversy with the I. A. M. focused upon the interpretation to be given to the union security provisions of T. W. A.-I. A. M. Bargaining Agreement, the Systems Board of Adjustment had jurisdiction.

This argument by the I. A. M. is totally without merit. It was rejected by the District Court and the Court of Appeals, and for good reason. Brady's membership in the Union was not cancelled because of any interpretation given to the union security provisions of the T. W. A.-I. A. M. Bargaining Agreement. On the contrary, Brady's membership in the I. A. M. and his discharge were accomplished by virtue of the interpretation given by the I. A. M. to the automatic cancellation provision of the I. A. M.'s Constitution, Article E, Section 14, which interpretation completely ignored the union security provision of the Bargaining Agreement.

The I. A. M. only used the Bargaining Agreement to accomplish its unlawful purpose—to get rid of Brady and make it stick.

The Union security provision of the T. W. A.-I. A. M. Bargaining Agreement, Article XXVI(a) provided:

". . . membership in good standing in the Union shall consist of payment by the employee of dues for each calendar month, no later than the last day of the following calendar month, . . ."

On the other hand, the automatic cancellation provision of the I. A. M. Constitution, Article E, Sec. 14, provided:

> "Sec. 14. Delinquency for three months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last reinstatment as shown by the G. L. records and their rights, privileges and benefits under the provisions of this Constitution shall attach and date from their last reinstatement, as though they had never before held membership in the I. A. M."

These provisions are qutie clear when read together and do not raise a question of interpretation, except incidentally. Brady's dues were paid up through November of 1955. Therefore, under the above provision, Brady's December dues were due by the end of January, his January dues were due by the end of February, and his February dues were due by the end of March. When Brady paid three months dues on March 27, 1956, in response to a union demand that *dues* be paid by March 28, he was only two months behind and his payment eliminated all delinquencies, and the District Court, and the Court of Appeals, so held.

Nevertheless, the I. A. M. continued to insist that Brady was delinquent in the payment of dues, not under the Union security provisions of the T. W. A.-I. A. M. Bargaining Agreement, but under the automatic cancellation provision of the I. A. M. Constitution, Article E, Section 14, taking the position that dues were payable at the beginning of the month under Article E, Section 14, not at the end of the following month, as provided in the Bargaining Agreement.

Therefore, the I. A. M. conveniently attempted to remove the controversy from an employee-union dispute to

one involving the employer, by citing Brady for discharge, rather than attempting to resolve the dispute as to the interpretation to be given the automatic cancellation provision of the I. A. M. Constitution, Article E, Section 14, by internal union adjustment.

The Systems Board of Adjustment, consisting of two representatives of the Union and two representatives of the employer, was therefore asked to interpret a provision of the I. A. M. Constitution in a dispute between an employee and his bargaining representative, and had to accept the I. A. M. interpretation even though it conflicted with the clear provisions of the Bargaining Agreement.[12]

This is the very reason that the statutory jurisdiction of the Systems Board of Adjustment is limited to disputes involving the employee and his employer and, further, it is the reason this Court and other Courts of Appeals have consistently ruled that controversies involving the employee and his bargaining representative should not be resolved through a Systems Board of Adjustment proceeding where, as here, only incidental interpretation of the Bargaining Agreement is involved.

In this regard, the statement of the District Court is very much to the point:

> "It is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining representative." [13]

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12. See Exhibit P-1, page 26, where Woodling, a TWA member of the Systems Board questioned Miller how a three month delinquency had occurred under Article XXVI(a) of the Bargaining Agreement, and Miller referred to Article E, Sec. 14, of the IAM Constitution and explained that dues were payable at the beginning of the month, not the end of the following month.

13. *Brady v. I. A. M., et al.*, 167 F. Supp. at 472.

Therefore, the cases cited by the I. A. M. under I A (pages 13-18) of its Petition are totally inapplicable. In fact, the case of *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861 (Fourth Cir. 1955), cert. den. 250 U. S. 839 was modified by the same court in *Thompson v. Brotherhood of Sleeping Car Porters,* 316 F. 2d 191 (1963) to recognize that a Systems Board of Adjustment did not have jurisdiction in controversies between the employee and his bargaining representative, where hostile discrimination is alleged, citing among others as authority therefor in footnote 15 at page 198, the cases of *Conley, Cunningham,* and the *Brady* cases out of the District Court.

Therefore, the Court of Appeals was correct in ruling that the Systems Board of Adjustment did not have jurisdiction to consider Brady's controversy with his bargaining representative, the I. A. M., and the fact that incidental interpretation of the Bargaining Agreement is involved does not create such jurisdiction. *Conley v. Gibson,* 355 U. S. 41 (1957).

B. The Holding of the Court of Appeals That the Claim of Hostile and Bad Faith Discrimination in the Complaint Raises a Federal Question, Does Not Conflict With Decisions of This Court or the Decisions of Other Courts of Appeals.

The Court of Appeals ruled that Brady set forth in his Complaint, as amended,

> "Allegations of 'willful and deliberate' discrimination by the I. A. M."

This finding is supported by the allegations of Brady's Complaint, as amended, wherein Brady asserted that the I. A. M. subjected Brady to dues enforcement proceedings (after he had paid dues) not accorded other employees, knowingly misrepresented to the Systems Board of Adjustment that Brady had not paid dues, and deliberately lied to the Board

by changing the content of a letter which Miller read to the Board.

These allegations of deliberate and willful discrimination to secure Brady's discharge in violation of the I. A. M.'s statutory duty to represent him fairly, vest the Federal Court with federal question jurisdiction. *Conley v. Gibson,* 355 U. S. 41 (1957); *Vaca v. Sipes,* 386 U. S. 171 (1967); *Humphrey v. Moore,* 375 U. S. 335 (1964); *Ford Motor Co. v. Huffman,* 345 U. S. 330 (1953); *Rumbaugh v. Winifrede R. R.,* 331 F. 2d 530 (4th Cir.) cert. den. 371 U. S. 929 (1964); *Thompson v. Brotherhood of Sleeping Car Porters* 316 F. 2d 191 (4th Cir. 1953); *Cunningham v. Erie R. R.* 266 F. 2d 411 (2 Cir. 1959); *Noble v. Woodward,* 200 F. Supp. 785 (E. D. Pa. 1962).

Further, Brady has alleged and proven that his discharge was unlawful and in violation of the Railway Labor Act, 45 USCA Sec. 152 (Eleventh). Therefore, since Brady was discharged for reasons other than non-payment of dues, Section 2 (Fourth), of the Railway Labor Act (45 USCA Sec. 152 (Fourth)), was also violated. Coercion having been found by virtue of the violation of 2 (Fourth), the intent to coerce is presumed (*Radio Off. Union of the Comm. Telegraphers Union, AFL v. NLRB,* 347 U. S. 17, 44-45) and T. W. A. under these circumstances is held to be strictly liable. *Cunningham v. Erie Railroad Co.,* 358 F. 2d 640 (2nd Cir. 1966); see also the Note "Dues Disputes under the Railway Labor Act", Vol. 76 of the Yale Law Journal, page 210, 214 (1966).

Lastly, there exists a third basis for federal question jurisdiction. Brady has alleged and proven that the automatic cancellation provision of the I. A. M. Constitution, Article E, Sec. 14, as interpreted by the I. A. M., when read in conjunction with the clear union security provisions of the Bargaining Agreement, was ambiguous and created a

double standard for dues enforcement; and, therefore, violates the Railway Labor Act, 45 USCA 154 (Eleventh).[14]

For instance, Clifford Miller, General Chairman, District 142, of the I. A. M., had sent a letter demand to Brady on March 13, 1956, informing him that if he did not pay dues by March 28, 1956, he would be discharged from his employment (Exhibit P-3). On March 27, 1956, Brady tendered his check, in the amount of $10.50 together with his dues book, to Gerald C. Coleman, Financial Secretary of Local 1776, District 142 of the I. A. M. (N. T. 242-243). Brady's tender was sufficient to enable him to maintain his membership with the I. A. M. in good standing under Article XXVI(a), and eliminate his prior delinquency—and the District Court and the Court of Appeals so held.

Coleman, on instructions from Miller, rejected Brady's tender of March 27, 1956, and invoked the automatic cancellation provisions of Article E, Sec. 14, demanding, in addition to the three months dues, which Brady had already paid, a reinstatement fee (Exhibit P-4) (N. T. 257-259). Miller testified that he felt dues were payable on the first day of the month under Article E, Sec. 14 (N. T. 389).

Therefore, the automatic cancellation provision of Article E, Sec. 14 of the I. A. M. Constitution as enforced by Miller created a double standard for dues enforcement. Miller was able to demand dues under Article XXVI(a), Exhibit P-3 (and then in an improper amount[15]) and when Brady paid[16] sufficient dues (N. T. 242-243), was able to

14. *Brady v. T. W. A., et al.*, 174 F. Supp. 360, 365.

15. Miller demanded dues through March, 1956. Under the terms of Article XXVI(a), March dues were not payable until May 31, 1956.

16. Brady tendered his check for $10.50, which under Article XXVI(n), amounted to payment. "(n) . . . The condition of payment shall be met if the amount due is tendered to the Local Lodge Financial Secretary of the Union in person or is mailed to him within the prescribed time limits, and such secretary refuses to accept such tender."

reject such payment and proceed to demand a reinstatement fee (Exhibits P-4 and P-14), payment of which would have caused forfeiture of seniority (Exhibit P-7) (N. T. 308), and non-payment of which resulted in discharge (Exhibit P-70). The ambiguity created by the I. A. M.'s interpretation of the I. A. M. Constitution, as applied to Brady's circumstances, not only eliminated jurisdiction of the Systems Board of Adjustment, but caused federal question jurisdiction to be vested in the District Court. See *Cunningham v. Erie R. Co.*, 266 F. 2d 411, 416 (1959):

> "Moreover, Cunningham is also claiming violations of the specific requirements of the Railway Labor Act: (1) dismissal only for non-payment of dues, and (2) dues uniformly required.
>
> "The allegations and the proof demonstrate that what Cunningham is doing in this action is questioning the validity of the collective bargaining agreement as applied to the circumstances of his dismissal, rather than the 'interpretation or application' of the agreement. Hence, *Alabaugh* to the contrary notwithstanding, we conclude that the Adjustment Board had no statutory authority to decide the dispute, and that the district court was competent to proceed against the union, against which Cunningham leveled the charge of discrimination, in violation of the express or implied duty under the terms of the collective bargaining agreement to represent him fairly and impartially."

Therefore, the Court of Appeals' decision that the District Court had subject matter jurisdiction over Brady's suit was correct in view of the allegations in the Complaint, as amended, of hostile discrimination, the alleged violation of Section 2(Fourth) (Eleventh) of the Railway Labor Act, 45 USCA 152 (Fourth) and (Eleventh), and of the

asserted invalidity of the union security provisions under the Railway Labor Act of the I. A. M. Constitution, Article E, Section 14, as applied to Brady's circumstances.

C. The Decision of the Court of Appeals That Brady Who Was Caused to Be Discharged From His Employment by the I. A. M. in Violation of the Railway Labor Act Was Not Required to Exhaust Internal Union Remedies Before Seeking Reinstatement to Membership in the Union and to His Employment in the Federal Courts Does Not Conflict With Decisions of Other Courts of Appeals.

The I. A. M. argues that Brady is barred from seeking reinstatement to membership in the Union and to his employment with T. W. A. in the Federal Court because he did not exhaust internal union appellate remedies, which the I. A. M. claim were available to him. The I. A. M. in making this argument ignores completely the very unfortunate fact that they were not satisfied merely to cancel Brady's membership in the Union. They went further, and had him discharged.

When they had him discharged, the legality of the dues increase (on which issue Brady capitulated) was no longer the center of the dispute. The controversy then focused on the legality of the discharge.

The cases cited by the I. A. M. at pages 19 and 20 of its Brief do not involve union security discharge situations; and, therefore, are not applicable to Brady's case. It is one thing to require an employee who has not been discharged to exhaust union remedies before he sues his union. But it is quite different to apply the same standard to an employee who has been caused to be discharged by his union.

Further, Brady was never given an opportunity by the I. A. M. to exhaust internal appellate union procedures to dispute the I. A. M.'s interpretation of the automatic cancellation provision of the I. A. M. Constitution. Miller's March 13, 1956, letter (Exhibit P-3) gave Brady 15 days to pay dues or be discharged. Brady did pay dues as required under the T. W. A.-I. A. M. Bargaining Agreement, but his tender was rejected by the I. A. M. The I. A. M.'s March 28, 1956, letter (Exhibit P-4) gave him four days to pay the same dues he had already paid, plus a reinstatement fee, or be discharged. And the I. A. M.'s April 11, 1956, letter gave him 15 days to pay a reinstatement fee or be discharged.

The I. A. M. Constitution provides that appeals from the decision of a local I. A. M. representative may be taken to the International President within thirty days of the decision. Brady was first cited for discharge within twelve days of the I. A. M.'s March 28, 1956, letter, the date that Brady was first notified that this membership in the union had been cancelled.

Not once did the I. A. M. inform Brady that his membership had been cancelled under the I. A. M. Constitution, and that under the appeals provision of the Constitution he had thirty days to appeal to the International President. On the contrary, the I. A. M. was always acting under the T. W. A.-I. A. M. Bargaining Agreement in order to secure his discharge from his employment. Once he had been cited for discharge, and that discharge acted upon, he had no alternative under his T. W. A.-I. A. M. Agreement but to appeal to the Systems Board of Adjustment, if he wanted to maintain his employment with T. W. A., which he did.

To say, as the I. A. M. does, that Brady voluntarily appealed his proposed discharge to the Systems Board of Adjustment, as he was not required to do so because he had

other remedies, is totally without merit. The T. W. A.-I. A. M. Bargaining Agreement is quite clear and leaves no doubt as to the remedies of an employee who is discharged. He must appeal that discharge within three days, or it will be deemed final and binding under the provisions of the Bargaining Agreement.

As the Court of Appeals held (Appendix B of Petition, p. 6a):

> "The doctrine (Exhaustion of Internal Remedies), relied on by IAM, applies to situations unlike the present one, which concern wholly internal union matters. The present dispute focuses on the employment relationship rather than the union relationship. Furthermore, Mr. Brady is seeking reinstatement in his employment, a remedy that is unavailable to him within the internal union procedures. These reasons justified the District Court in determining that Mr. Brady was not required to exhaust his internal union remedies before bringing suit against the IAM for violation of Section 2 (Fourth) (Eleventh)."

The case of *Gainey v. Brotherhood of Railway and Steamship Clerks, et al.*, 275 F. 2d 342 (3rd Cir. 1960), cited by the I. A. M. at page 20 of its Petition, is not authority to the contrary. The circumstances of the *Gainey* case, *supra*, are entirely different from the circumstances that faced Brady. *Gainey* did not involve a union security discharge, but involved only a question of whether or not the union had taken the necessary steps to compel the railroad to abide by the terms of a new agreement that had been negotiated between the Union and the Railroad.

D. The Court of Appeals Was Correct in Finding That the Complaint as Amended Raised the Issue of Hostile and Bad Faith Discrimination.

The I. A. M. at page 23 of its Petition again asserts that Brady did not allege "hostile and bad faith discrimination" in its complaint, as amended, and did not notify the I. A. M. that he had been mistrated until 18 months after litigation had started. Therefore, the discrimination charge was an after thought and without substance. This is just not the case.

Brady, in paragraph 12 of his complaint, as amended, alleged that Miller knowingly misrepresented to the Systems Board of Adjustment that Brady had not paid dues, that Miller knowingly represented that Brady on March 3, 1956 was asked to pay a reinstatement fee, and that Miller lied to the Systems Board when he misread the letter of March 28, 1956, sent by Coleman to Brady.

In paragrpah 20, Brady alleges acts of discrimination, and in paragraph 23 alleges that these acts of discrimination were "wilful and deliberate on the part of the I. A. M."

In addition, Brady, on April 18, 1956, pointed out to Miller that another member of the local was four months behind in paying dues and had not been cited for discharge (Exhibit P-63). On October 28, 1956, Brady, after he first reviewed the transcripts of the two systems board hearings, wrote to D. W. Harris, Vice President, Industrial Relations, T. W. A., to point out the misstatements of fact made by Miller at the Systems Board Hearing. Also, on February 2, 1957, well before suit was instituted against the I. A. M. and T. W. A. for unlawful discharge, Brady wrote to each member of the Systems Board, and to the I. A. M. International President. So both the I. A. M. and T. W. A. had clear notice of Brady's claim long before suit

was started, but they did nothing to right the wrong committed against Brady.

E. The Court of Appeals Decision Does Not Err in Any Substantial or Important Respect.

The argument of the I. A. M. at pages 25-27 of its Petition that Brady was subject to discharge under the I. A. M. Constution and I. A. M.-T. W. A. Bargaining Agreement was refuted by the District Court and the Court of Appeals, and, therefore, because the facts established beyond question that Brady paid dues in time to maintain his membership with the union in good standing, there is no reason to belabor the point further.

However, the I. A. M. goes further and argues that Brady should have no complaint for being cited for discharge under the Bargaining Agreement since he violated the 60 day provision of that Agreement by failing to pay dues for December, 1955 and January, 1956, by the end of February, 1956.

Thus, the I. A. M., by its assumption, implies that the T. W. A.-I. A. M. Bargaining Agreement sets up a different standard for dues enforcement than the I. A. M. Constitution. A similar argument was made before the District Court on April 21, 1958, by I. A. M. counsel, and the District Court asked counsel whether or not such an interpretation violated the Railway Labor Act, 45 USCA 152 (Eleventh), vesting subject matter jurisdiction in the Federal Court. The I. A. M. responded to the Court's question by announcing that its prior argument on this point was in error, and agreed that there was no difference between Article XXVI(a) of the Bargaining Agreement and Article E, Sec. 14 of the I. A. M. Constitution, stating:

> "Upon consideration of the point raised in the Court's February 4th letter, the language of the entire Article XXVI(a), and the record of the proceedings before the Systems Board of Adjustment, counsel believes that he was in error stating during the April 21 argument that there is any difference between Article XXVI(a) and Article E, Section 14 of the I. A. M. Constitution." [17]

So, the I. A. M. now assumes for purposes of argument before this Court a position that they retracted back in the District Court in April of 1958, when they felt that the District Court would affirm that jurisdiction existed upon the fact that the dues enforcement provisions contained in the Bargaining Agreement and the I. A. M. Constitution were not uniform and violated the Railway Labor Act.

This emphasizes even more the frustration that Brady has gone through over these 12 years of litigation to obtain reinstatement to his employment with T. W. A. and damages that have resulted from his unlawful discharge, a discharge which would not have occurred in the first place if Brady had been given notice of his responsibilities under the I. A. M. Constitution, rather than receiving arbitrary demands from the representatives of the I. A. M. as Bargaining Agent, first demanding dues, then dues and a reinstatement fee, then only a reinstatement fee, and finally having him discharged.

The time has come to end the litigation and return Brady to the employment and benefits he would have had but for the unlawful discharge. Two District Court Judges involving six reported (and one memorandum) opinions and the Court of Appeals have considered and rejected

17. *Brady v. I. A. M., et al.*, 174 F. Supp. 360, 366 (1959).

all of the arguments made by the I. A. M. over the last 12 years.

II. Reasons for Denying the Petition Filed by T. W. A.

The Court of Appeals was correct in holding that T. W. A. was subject to Automatic Liability by Virtue of the Unlawful discharge.

The cases deciding union security actions by employees have uniformly held that the employer, although only incidentally involved, is a party and may be compelled to respond in damages to the injured employee. *Richardson v. Texas & New Orleans Railroad Co.*, 242 F. 2d 230 (5th Cir. 1957); *Nobile v. W. B. Woodward, Jr., et al.*, 200 F. Supp. 785 (Ed. Pa. 1962); *Cunningham v. Erie R. Co.*, 358 F. 2d 640 (2d Cir. 1966).

In the *Richardson* case, *supra*, at page 236 the Fifth Circuit held:

> "It takes two parties to reach an agreement, and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they either know, or should know, is unlawful. Unless financial responsibility for a joint breach of such duty is required from both sides of the bargaining table, the statutory policy applied under *Steele* will be impractical of enforcement. For the foregoing reasons, we think the Brotherhood's obligation under this statute does not exist in vacuo, unsupported by any commensurate duty on the part of the carrier.
>
> "The Railroad may not have been the Brotherhood's keeper for bargaining purposes, but we think that under the allegations of this complaint, it can be required to respond to damages for breach of its own duty not to join in causing or perpetrating a violation of the Act and that policy which it is supposed to effectuate."

Finally, in the *Cunningham* case, *supra,* 358 F. 2d 640, 645 (1966) this court stated:

> "Once it is established, as here, that the expulsion of the worker from membership in the union was the product of an act of 'hostile discrimination' by the union, that is to say, 'for any reason other than the failure of the employee to tender the periodic dues . . . *uniformly required* as a condition of acquiring or retaining membership' 45 U. S. C. Sec. 152 (Eleventh)(a) (Emphasis Added), the Railroad, having discharged the employee on the representation of the union that he had failed to tender such periodic dues, uniformly required, is automatically liable for wrongful discharge. See Brady v. Trans World Airlines, D. C. Del. 1963, 223 F. Supp. 361. This is because the limited protection afforded by the Railway Labor Act is no longer available as a defense. See 45 U. S. C. Sec. 152 (Eleventh)(d) and (Fourth)."

Accordingly, we submit that the Court of Appeals was correct in finding joint liability against T. W. A. and the I. A. M. for reinstatement into the union and to his prior employment, plus damages for lost wages and lost benefits.

CONCLUSION.

For the foregoing reasons, the Petitions for a Writ of Certiorari filed by the I. A. M. and T. W. A. should be denied.

Respectfully submitted,

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